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THE

ARGUMENTS

USED

Pro and Con,

UPON THE

ATTAINDER

OF

Sir JOHN FENWICK. *k*

In a LETTER to a FRIEND.



LONDON,

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ARGUMENTS, &c.

SIR,



SEND you the Substance of the Arguments *Pro* and *Con*, in the Debates on the Bill of Attainder against Sir *John Fenwick*.

THE Evidence against him was but one Witness, (*Porter*;) which, by the Common Law, as it was settled by the late Act about Treasons, which just then

then took place, was not sufficient to convict him of High Treason. And this Evidence (*Porter*) Sir *John Fenwick's* Friends, his Lady in particular, had been tampering with, to persuade him by large Offers to go beyond Sea. But he had been too cautious for those who tried to seduce him. He proved the Practice on them by Witnesses he had concealed to over-hear the Discourse.

THE other Witness (*Goodman*) had been spirited away, but had first sworn Treason against Sir *John Fenwick* in the Trial of another Person, (*Cook*;) and to the Grand Jury who had found the Bill against Sir *John Fenwick* on his (*Goodman's*) and *Porter's* Evidence.

FROM this it was infer'd, that Sir *John Fenwick* was guilty of High Treason. And, because he could not be reach'd by Course of Law, it was judg'd that he ought to be attainted by Bill. He was accordingly so attainted, and suffer'd in pursuance of that Bill of Attainder.

THE

THE Arguments used against the Bill were :

‘ THAT Law was all Men’s Security,
 ‘ as well as it ought to be their Rule.
 ‘ If This was once broke through, no
 ‘ Man was safe. Men would be pre-
 ‘ sumed guilty without legal Evidence,
 ‘ and be run down and destroy’d by a
 ‘ Torrent. Two Witnesses seem’d ne-
 ‘ cessary, by an indisputable Law of
 ‘ Justice, to prove a Man Guilty. The
 ‘ Law of God given by *Moses*, as well
 ‘ as the Law of *England*, made this
 ‘ necessary. And, besides all former
 ‘ Laws, the Law lately made for Trials
 ‘ in Cases of Treason, was such a fa-
 ‘ cred one, that it was to be hoped
 ‘ even a Parliament would not make
 ‘ a Breach upon it. A written Depo-
 ‘ sition was no Evidence in Law; when
 ‘ the Person accused could not have
 ‘ the Benefit of cross-interrogating the
 ‘ Witness, by which much false Swear-
 ‘ ing was often detected. Nor could
 ‘ the Evidence given in one Trial be
 ‘ brought against a Man who was not
 ‘ a Party in that Trial. The Evidence
 ‘ that was offer’d to a Grand Jury, was
 ‘ to

' to be examin'd all over again at the
 ' Trial. Till That was done, it was
 ' not Evidence. It did not appear that
 ' *Fenwick* himself was concern'd in the
 ' Practice on *Porter*. What his Lady
 ' did, could not be charged on him. No
 ' Evidence was brought that *Goodman*
 ' was practis'd on; so his withdrawing
 ' himself could not be charged on *Fen-*
 ' *wick*. Some very black things were
 ' proved against *Goodman*, which would
 ' be strong to set aside his Testimony,
 ' tho he were present. And That Proof,
 ' which had been brought in *Cook's*
 ' Trial against *Porter's* Evidence, was
 ' again made use of, to prove that, as
 ' he was the single Witness, so he was
 ' a doubtful and suspected one. Nor
 ' was it proper that a Bill of this na-
 ' ture should begin in the House of
 ' Commons, that could not take Exa-
 ' minations upon Oath.' This was the
 Substance of the Arguments that were
 urg'd against the Bill.

ON the other hand, it was said in
 behalf of the Bill:

' THAT the Nature of Government
 ' required that the Legislature should
 be

' be made use of in extraordinary Ca-
 ' ses, for which effectual Provision
 ' could not be made by fixed and
 ' standing Laws. Our Common Law
 ' grew up out of the Proceedings of
 ' the Courts of Law. Afterwards this
 ' Common Law in Cases of Treason
 ' was thought too loose. So the Law
 ' in this Point was limited, first by the
 ' famous Statute in King *Edward* the
 ' Third's Time; and then, by the Sta-
 ' tute in King *Edward* the Sixth's
 ' Time. The Two Witnesses were to
 ' be brought face to face with the Per-
 ' sons accused. And the Law lately
 ' made had brought the Methods of
 ' Trials to a great Certainty. Yet in
 ' That, as well as in the Statute of
 ' *Edward* the Third, Parliamentary
 ' Proceedings are still excepted. And,
 ' indeed, tho no such Provision had
 ' been expressly made in the Acts them-
 ' selves, the Nature of Government
 ' puts always an Exception in favour
 ' of the Legislative Authority. The
 ' Legislature was indeed bound to ob-
 ' serve Justice and Equity, as much as,
 ' if not more than the Inferior Courts;
 ' because the Supreme Court ought to
 ' set an Example to all others. But
 ' they might see cause to pass over

Forms, as occasion should require. This was the more reasonable among us; because there was no Nation in the World, besides *England*, that had not recourse to Torture, when the Evidence was defective. That was a mighty Restraint, and struck Terror into all People. And the Freest Governments, both antient and modern, have thought they could not subsist without it. At present the *Venetians* have their Civil Inquisitors, and the *Grisons* have their High Court of Justice, which act without the Forms of Law, by the absolute Trust which is reposed in them; such as the *Romans* reposed in Dictators in the time of their Liberty. *England* has neither Torture, nor any unlimited Magistrate, in its Constitution. And therefore upon great Emergents, Recourse must be had to the Supreme Legislature. Forms are necessary in subordinate Courts: But there is no reason to tie up the Supreme one by them. This Method of Attainders has been practised among us at all times. It is true, what was done in this way at one time, was often reversed at another. But That was the Effect of the Violence of the Times, and

' and was occasion'd often by the In-
 ' justice of those Attainders. The
 ' Judgments of the inferior Courts were
 ' upon the like account often revers'd.
 ' But when Parliamentary Attainders
 ' went upon good Grounds, tho' with-
 ' out observing the Forms of Law, they
 ' were never blam'd, not to say con-
 ' demn'd. When Poysoning was first prac-
 ' tis'd in *England*, and put in a Pot of
 ' Porridge in the Bishop of *Rocheſter's*
 ' House, This, which was only Felony,
 ' was by a ſpecial Law made to
 ' be High Treason: And a new Punish-
 ' ment was appointed by Act of Par-
 ' liament: The Poyſoner was boil'd
 ' alive. When the Nun of *Kent* pretended
 ' to Visions to oppose King *Henry* the
 ' VIIIth's Divorce, and his ſecond Mar-
 ' riage; and ſaid, *If he married again,*
 ' *he ſhould not live long after it, but ſhould*
 ' *die a Villain's Death*: This was judg'd
 ' in Parliament to be High Treason;
 ' and ſhe and her Accomplices ſuffer'd
 ' accordingly. After that, there paſſed
 ' many Attainders in that Reign, only
 ' upon Depoſitions that were read in
 ' both Houſes of Parliament. It is true,
 ' Theſe were much blam'd; and there
 ' was great Cauſe for it. There were
 ' too many of them: for this extreme
 ' way

way of Proceeding is to be put in pra-
 ctice but seldom, and on great Occa-
 sions. Many of these went upon
 slight Grounds ; such as the uttering
 some passionate and indecent Words,
 or the using some Embroidery in Gar-
 ments and Coats of Arms with an ill
 Intent. But that which was indeed
 execrable was, that Persons in Prison
 were attainted without being heard
 in their own Defence. This was so
 contrary to natural Justice, that it
 could not be enough condemn'd. In
 King *Edward* the VIth's Time the
 Lord *Seymour* was attainted in the
 same manner, only with this diffe-
 rence, that the Witnesses were brought
 to the Bar, and there examin'd ;
 whereas formerly they proceeded up-
 on some Depositions that were read to
 them. At the Duke of *Somerſet's*
 Tryal, which was both for High-
 Treason, and for Felony, in which he
 was acquitted of the former, but found
 guilty of the latter, Depositions were
 only read againſt him ; but the Wit-
 nesses were not brought Face to Face,
 as he preſs'd they might be : Upon
 which it was, that the following Par-
 liament enacted, That the Accuſers,
 (that is, the Witnesses) ſhould be
 examin'd

examin'd Face to Face, if they were
 alive. In Queen Elizabeth's time, the
 Parliament went out of the Method of
 Law in all the Steps of the Proceed-
 ings against the Queen of Scots. It is
 true, there were no Parliamentary
 Attainders in England during that long
 and glorious Reign : (upon which those
 who oppos'd the Bill insisted much :)
 Yet that was only, because there was
 no occasion here in England for any such
 Bill. But, in Ireland, where some things
 were notoriously true, which yet could
 not be legally prov'd, that Government
 was forc'd on many different occasions
 to have recourse to this Method. In
 King James the Ist's Time, those who
 were concern'd in the Gunpowder Plot,
 and chose to be kill'd rather than taken,
 were by Act of Parliament attainted
 after their death : which the Courts of
 Law could not do, since by our Law
 a Man's Crimes die with himself ; for
 this reason, because he cannot make
 his own Defence, nor can his Children
 do it for him. The famous Attain-
 der of the Earl of Strafford in
 King Charles the Ist's Time has been
 much and justly censur'd ; not so much,
 because it pass'd by Bill, as because of
 the Injustice of it. He was accus'd for
 having

' having said, upon the House of Com-
 ' mons refusing to grant the Subsidies
 ' the King had ask'd, *That the King was*
 ' *absolv'd from all the Rules of Govern-*
 ' *ment, and might make use of Force to*
 ' *subdue THIS KINGDOM.* These
 ' Words were prov'd only by one Wit-
 ' ness, all the rest of the Council who
 ' were present deposing, that they re-
 ' membered no such Words, and were
 ' positive that the Debate ran upon the
 ' War with *Scotland*: So that, tho' *THIS*
 ' *KINGDOM*, taken singly, must be
 ' meant of *England*, yet it might well be
 ' meant of *THAT KINGDOM*, which
 ' was the Subject of the present Debate.
 ' Since then the Words were capable of
 ' that favourable Sense, and that he who
 ' spoke them affirm'd that he meant
 ' them in that Sense, it was a most per-
 ' nicious Precedent, first to take them in
 ' the most odious Sense possible, and then
 ' to destroy him who said them upon
 ' the Testimony of one single Witness:
 ' Whereas, if upon the Commons refu-
 ' sing to grant the King's Demand, he
 ' had advis'd the King to subdue his
 ' People by Force, it is hard to tell what
 ' the Parliament might not justly have
 ' done, or would not do again in the
 ' like Case. In King *Charles the II'd's*
 ' Time,

Time, some of the most eminent, of
the Regicides were attainted after they
were dead. And in King *James's* Time
the Duke of *Monmouth* was attainted
by Bill. These last Attainders had
their first beginning in the House of
Commons.

THUS it appear'd, that for these last
two hundred Years, not to mention
much antienter Precedents, the Nation
has, upon extraordinary Occasions, pro-
ceeded in the Parliamentary way by
Bill. There were already many Pre-
cedents of this Method. And, where-
as it was said, that an ill Parliament
might carry these too far; it is cer-
tain, the Nation, and every Person in
it, must be safe, when they are in their
own Hands, or in a Representative
chosen by themselves: As, on the other
hand, if That be ill chosen, there is no
Help for it; the Nation must perish,
for it is by their own Fault. They
have already too many Precedents for
this way of proceeding, if they intend
to make an ill use of them. But a Pre-
cedent is only a Ground, or Warrant,
for the like Proceeding on a like Oc-
casion.

' TWO Rules were laid down for all
 ' Bills of this kind. The Matter must
 ' be of a very extraordinary nature.
 ' Lesser Crimes are better pass'd over
 ' than punish'd by the Legislature. Of
 ' all the Crimes that can be contriv'd a-
 ' gainst the Nation, certainly the most
 ' heinous one is, That of bringing in a
 ' foreign Force to conquer us. This
 ' ruins all, Us, and our Posterity for
 ' ever. Distractions at home, how fa-
 ' tal soever, even tho' they should end
 ' ever so tragically, as ours did, in the
 ' Murder of a King, and in a military
 ' Usurpation, yet were capable of a *Cri-*
 ' *sis*, and a Cure. In the Year 1660, we
 ' came again to our Wits, and all was
 ' set right again: whereas there is no
 ' prospect, after a foreign Conquest, but
 ' of Slavery and Misery. And how black
 ' soever the assassinating the King must
 ' needs appear, yet a foreign Conquest
 ' may be call'd the assassinating the
 ' Kingdom; and therefore the inviting
 ' and contriving That, must be the
 ' blackest of Crimes. But, as the Im-
 ' portance of the Matter ought to be e-
 ' qual to such an unusual way of pro-
 ' ceeding, so the Certainty of the Facts
 ' ought to be such, that, if Defects in
 ' Legal

' Legal Proof are to be supplied ; yet
 ' this ought to be done upon such
 ' Grounds, as make the Fact appear so
 ' evidently true, that, tho' a Court of
 ' Law could not proceed upon it, yet no
 ' Man could raise in himself a Doubt
 ' concerning it. Antiently, Treason was
 ' judg'd, as Felony still is, upon such
 ' Presumptions as satisfied the Jury.
 ' The Law has now limited this to two
 ' Witnesses brought Face to Face. But
 ' the Parliament may still take that Li-
 ' berty, which is denied to inferior
 ' Courts, of judging this Matter as an
 ' ordinary Jury does in a Case of Felo-
 ' ny. In this Case, there is one Wit-
 ' ness present, (*Porter*,) upon whose
 ' Testimony several Persons have
 ' been condemn'd, and suffer'd. And
 ' These, neither at their Tryal, nor at
 ' their Death, disprov'd, or denied, any
 ' Circumstance of his Depositions. If
 ' he has been too much a Libertine in
 ' the Course of his Life, That does not
 ' destroy his Credit as a Witness. In
 ' the first Tryal, this might have made
 ' him a doubtful Witness: But what has
 ' happen'd since has destroy'd the Possi-
 ' bility even of suspecting his Evidence.
 ' A Party has been in Interest concern'd
 ' to enquire into his whole Life: And
 ' now they have had time for it ;' (for

Cook's Tryal was in the *Summer* before,
 and now was the *Winter*:) And every
 Circumstance of his Deposition has
 been examin'd; and yet nothing is
 discover'd that can so much as make a
 Doubt: All is still untouch'd, sound
 and true. The only Circumstance, in
 which the dying Speeches of those who
 suffer'd on his Evidence seem to contra-
 dict him, is concerning King *James's*
 Commission. Yet none of them de-
 nied what *Porter* had depos'd; which
 was, that *Charnock* told him, there was
 a Commission come from King *James*
 for attacking the Prince of *Orange's*
 Guards: They only denied, that there
 was a Commission for assassinating him,
Sir John Friend and *Sir William Perkins*
 were condemn'd for the Consultation
 now given in Evidence against *Fen-*
wick. They did not denying it;
 On the contrary, they justified all they
 had done. It could not be suppos'd,
 that if there had been a Tittle in the E-
 vidence that was false, they should have
 been so far wanting to themselves, and
 to their Friends, who were to be tried
 upon the same Evidence, as not to have
 declar'd it in the solemnest manner.
 These things were more undeniably
 certain, than the Evidence of ten Wit-
 nesses could possibly be. Witnesses
 might

‘ might conspire to swear a Falshood :
 ‘ But in this Case the Circumstances
 ‘ took away the possibility of a Doubt.
 ‘ And therefore the Parliament, with-
 ‘ out taking any notice of *Goodman*’s Evi-
 ‘ dence, might well judge *Ferwick* Guil-
 ‘ ty ; for no Man could doubt of it in
 ‘ his own Mind.

‘ THE antient *Romans* were very
 ‘ jealous of their Liberty. Yet, how
 ‘ exact soever they were in ordinary
 ‘ Cases, when any of their Citizens
 ‘ seem’d to design to make himself their
 ‘ King, they either created a Dictator
 ‘ to destroy him, or the People proceed-
 ‘ ed against him in a very * Summary
 ‘ Way. And, tho by the *Portian Law*,

* The punishing Persons by a Law,
 made by the People expressly for that end,
 is call’d a Summary Way of Proceeding ;
 because, tho by the first *Valerian Law*, Ap-
 peals were to be allow’d to the People, yet
 they were to be Appeals from the Judgment
 of the Consul, or of the other Magistrates,
 or from the Ordinance of the Senate. And
 the People’s punishing any who offended them
 by a new Law made by them for that pur-
 pose, and so taking Cognizance of the Cause
 at the first Instance, was a Method taken only
 on extraordinary Occasions, and answers the
 nearest to our Bills of Attainder.

‘ no Citizen was to be put to death for
 ‘ any Crime; yet such regard had they
 ‘ to Justice even above Law, that, when
 ‘ the * *Campanian* Legion had perfi-

* The Military Part being excepted in the
 several *Valerian*, in the *Portian*, and the *Sem-
 pronian* Laws; because it was evident, that
 an Army could not be kept together without
 a Martial Law, allowing the Commanders the
 Power of Life and Death: it may seem that
 this Severity to the *Campanian* Legion was
 only a piece of Military Discipline. But it
 seems that the Execution of this Legion was
 not by the Generals in the Field, as their
 Military Executions used to be, but by order
 of the Consuls at *Rome*, and in the *Forum*, as
Polybius informs us; and the Punishment was
 not the Military Capital Punishment: (which
 was, according to the *Roman* Custom, for the
 Tribune to strike the Criminal with a *Fustis*,
 after which he had liberty to run, and escape
 if he could, and the Soldiers liberty to kill
 him, if they could reach him, with any Wea-
 pon they pleased :) But they were, as *Polybius*
 and the Epitomist of *Livy* tell us, *whipt and
 beheaded*, which was the proper, Civil, Capital
 Punishment of the *Romans*. And therefore the
 Execution of this *Campanian* Legion, tho it may
 be thought only a Military one, appears really
 to have been a Civil one; the Criminals not
 being punish’d as Soldiers, but as Citizens,
 who had brought the Reproach of Perfidy on
 their Country: and consequently was plainly
 an Infraction on the *Portian* Law, which was
 then but newly made.

‘ diously

' diously broke in upon *Rhegium*, and
 ' pillaged it, they put them all to death
 ' for it. And in the famous Case of *Ca-*
 ' *tiline's* Conspiracy, when the Evi-
 ' dence was clear, and the Danger ex-
 ' treme, the Complices of it were put to
 ' death, notwithstanding the *Portian*
 ' Law. And that was done by the or-
 ' der of the Senate, without hearing
 ' them make their own Defence, or
 ' claim the Right, that the *Valerian*
 ' Law gave them, of an Appeal to the
 ' People. And yet that whole Pro-
 ' ceeding was managed chiefly by the
 ' Two Greatest Assertors of Publick
 ' Liberty that ever lived, *Cato* and *Ci-*
 ' *cero*. And *Cæsar*, who opposed it on
 ' the pretence of the *Portian* Law,
 ' was for that very reason suspected to
 ' be in the Conspiracy. And it appear'd
 ' afterwards, how little regard he had
 ' either to Law or Liberty, tho on this
 ' occasion he made use of the One to
 ' cover Those who were in a Plot a-
 ' gainst the Other *.'

* It is worth observing, that the Conduct
 of the Consul (*Cicero*) in this Conspiracy was
 in direct opposition to the Laws and Consti-
 tution of his Country; and could only be
 justified

justified by its being necessary for the Preservation of That Constitution, which he now, by the Advice of the Senate, for once infringing'd, that it might be secured for ever after. And (which is very remarkable) *Caesar* himself, who was for preserving a sacred Regard to the *Portian* and *Sempronian* Laws, seems to have forgot the *Valerian* Law, and the other Laws, which had made the People the Dernier Resort of Justice, when he consented, nay proposed, to inflict a very severe Penalty on the Conspirators, without mentioning the referring it to the People, or leaving room for an Appeal to them, which was as much against Law as the other. Nay, (which was yet a higher Usurpation on the People's Rights) he was for the Senate's decreeing, 'That any one who should ever move either the Senate or the People in their favour, should be esteem'd a Publick Enemy.' In short, he was for any thing, let it be never so absurd, that might respite their Execution. And *Cicero*, in his Fourth Oration against *Catiline*, which was spoke in the Senate on the same day with *Caesar's*, in summing up the Debate, when he mentions this Opinion of *Caesar*, 'That the Traytors should be dispers'd in Prisons thro the several Towns of *Italy*;' says upon it, 'That it seem'd to be against Law, if the Senate should order it by their own Authority; and a very difficult Point to carry, if they were to propose it to the People.' *Habere videtur ista res iniquitatem, si imperare velis; difficultatem,*

facultatem, si rogare. Cicero himself seems to prefer the taking a sudden Step for the Safety of the Commonwealth, such as was the putting the Prisoners to an immediate death, to the establishing illegally a deliberate Punishment, which could require no haste, if that was the Measure they should resolve upon.

The Inference then, that seems to have naturally arisen, in this Debate on Sir John Fenwick's Attainder, from the Instance of the *Catilinarian* Conspiracy, was, That, if in so wise a Government, as the *Roman*, and so jealous of Liberty, all the best and most publick spirited Men were for doing even an illegal Act to preserve the Whole; and thought the Senate (who were but a part of the Legislature, or rather but a Council of State to the People, who by the *Roman* Constitution, as it settled after the Expulsion of the *Tarquins*, were properly and solely the Legislature, according to the *Maxim* of Tully, *Potestas in Populo, Auctoritas in Senatu*) might justly assume to themselves the Supreme Power, and even act contrary to particular Laws then in force, as well as to the general Constitution of the Commonwealth: Then then there can be no colour of Reason for us of this Nation so to betray our Weakness to all the World, as to shew them, that we chuse rather to expose our selves to Ruin, and to teach our Enemies how to injure us with Safety, than once to go out of the common Road of Law, tho' by an Act of the Legislature itself, and with the strictest regard to real and essential Justice: We need not be afraid of passing for Betrayers
of

The inference then, that seems to have un-
usually arisen, in this Debate on Sir John Hen-
rick's Amendment, from the Influence of the Ca-
tholican Conspiracy, was, That, if it is wise
a Government, as the Roman, and so jealous
of Liberty, all the bad and evil which has
befallen Men were for doing even an illegal Act to
preserve the Whole; and thought the Senate
who were but a part of the Legislature, or
rather but a Council of State, to the People, who
by the Roman Constitution, as it feared rather
the Expulsion of the Tyrant, were properly
and solely the Legislature, according to
the Maxim of Tully, *Potestas in Populo*, and
even in (Sextus) *Populus* himself, allude to
themselves the People, and even as
contrary to Populus, when in force,
as well as to the Constitution of the
Commonwealth: Then there can be no
colour of Reason for us of this Nation to re-
lax, our Weakness to all the World, as to
show them, that we chuse rather to expose
our selves to Ruin, and to teach our Enemies
how to injure us, than once to
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